

**NOV 14 2005****CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

TIBURCIO GARCIA-CHEPE,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney  
General,

Respondent.

No. 03-74327

Agency No. A74-412-791

MEMORANDUM<sup>\*</sup>

On Petition for Review of an Order of the  
Board of Immigration Appeals

Submitted November 8, 2005<sup>\*\*</sup>

Before: WALLACE, LEAVY, and BERZON, Circuit Judges.

Tiburcio Garcia-Chepe, a native and citizen of Mexico, petitions for review of a Board of Immigration Appeals (“BIA”) order denying his motion to reopen his deportation proceedings. Reviewing for abuse of discretion, *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000), we deny the petition for review.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Whether Garcia-Chepe's motion was untimely depends on whether he was eligible for relief pursuant to the settlement in *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002), which provides that "where the EOIR has not sua sponte reopened an eligible class member's case, such individual shall be eligible to file a motion to reopen, not subject to the time or numerical limitations in 8 C.F.R. § 3.2 or 8 C.F.R. § 3.23 . . . within the motion to reopen period as defined [in the settlement]." *Id.* at 1036. We conclude that the BIA did not abuse its discretion in determining that Garcia-Chepe is not an eligible class member, because his suspension of deportation case was not "taken under submission following a merits hearing before February 13, 1997." *Id.* at 1032; *see also Sotelo v. Gonzales*, No. 03-74083, 2005 WL 2679781, \*3 (9th Cir. Oct. 21, 2005) ("to be a member of the *Barahona-Gomez* class an immigrant must show that . . . he or she had a suspension of deportation hearing before April 1, 1997 (or would have had a hearing but for the directives at issue)"). Garcia-Chepe's suspension of deportation hearing took place on April 7, 1997.

Garcia-Chepe's contention that the BIA's decision is contrary to *Guadalupe-Cruz v. INS*, 240 F.3d 1209, *as amended by* 250 F.3d 1271 (9th Cir. 2001), is unpersuasive, as his suspension of deportation hearing did not occur before April 1, 1997, the effective date of the stop-time rule. *See id.* at 1211.

We decline to review Garcia-Chepe's contention in his reply brief concerning the BIA's denial of sua sponte reopening, as this argument was not raised in his opening brief. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996).

**PETITION FOR REVIEW DENIED.**